

**OPINION
75-27**

November 18, 1975 (OPINION)

The Honorable Myron H. Atkinson, Jr.
State Representative, 32nd District
P.O. Box 1176
Bismarck, ND 58501

Dear Representative Atkinson:

This is in reply to your letter of October 31, 1975, relative to Section 44-04-18 of the N.D.C.C. You state the following facts and questions:

"As a result of several North Dakota Supreme Court decisions dealing with an interpretation of Section 44-04-18, N.D.C.C., there appears to have arisen some question as to the accessibility of county court records, and particularly probate files, by those who might appear to have a legitimate interest in such information.

"In the particular issue presented, which is the basis for this request, the owner of an undivided mineral leasehold interest hired an abstracter for the purpose of preparing verbatim copies of all public office information which might have a bearing on the status of the title. The abstracter sought to make copies of the probate files which had a bearing on the title but the request was declined by the County Judge's Office on the basis that the probate files were confidential. It would appear that without this information the quality of title cannot be adequately evaluated.

"I am informed that this problem has arisen in a number of counties, and would certainly appreciate the opinion of your office as to the accessibility of such information under these circumstances."

Section 44-04-18 of the N.D.C.C. provides:

"ACCESS TO PUBLIC RECORDS. Except as otherwise specifically provided by law, all records of public or governmental bodies, boards, bureaus, commissions or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours."

The North Dakota Supreme Court, in Grand Forks Herald v. Lyons 101 N.W.2d 543 (N.D. 1960) stated, page 546 of the reported case:

"We do not believe that any of the designations refer to or include records of county courts. Counsel for the plaintiff and appellant contends that county courts come within the designation 'agencies of the state.' If the Legislative Assembly had intended that the provisions of this law should be

so broad as to include the county courts, it would have been a simple matter to say so. We have examined the legislative proceedings which resulted in passage of this law, and nowhere do we find any indication that the Legislature intended 'agencies of the state' to include the courts or to include anything except those departments, agencies, and bureaus of the State which it clearly included, such as 'governmental bodies, boards, bureaus, commissions, * * * or political subdivisions.' The Legislature no doubt intended to make information available to the public relative to the spending of public monies and the handling of public business. And that is all that is intended."

The Court concluded that records of the county court, with the exception of marriage licenses, were not governed by Section 44-04-18 but rather by Section 27-07-36 of the N.D.C.C. In so holding the Court stated, page 547 of the reported case:

"We believe that the Legislature, in providing that the records of the county court should be open to inspection during office hours 'by persons having business therewith,' did not intend to open such records to the public generally. Had that been the intent, the Legislature could have said so in simple language. But access to such records is limited to persons who have 'business therewith.' Surely it cannot be argued that the doctor or the storekeeper or the village gossip have such an interest in the estate of a neighbor who lived in the next block that their interest in the records of his estate constitutes 'business therewith.'"

The Supreme Court, in *State v. O'Connell* 151 N.W.2d 758 (N.D. 1967) modified its decision in *Lyons* supra, to indicate that criminal records of a county court would be open to the public subject to the Court's power to adopt reasonable rules fixing the time, place and manner for inspection. The decision left no doubt, however, that probate records were still governed by the *Lyons* decision.

The matter of the inspection of probate records is therefore governed not by Section 44-04-18 of the N.D.C.C., but rather by Section 27-07-36 of the N.D.C.C. This section provides in part:

"The records of the court shall be open to inspection during office hours by persons having business therewith."

This statute limits the access to probate records to persons "having business therewith." Section 44-04-18 contains no such limitation. The Supreme Court in the *Lyons* decision, indicated that the meaning of the word "business" as used in Section 27-07-36 would imply some activity involving a direct or personal interest.

We would therefore conclude that probate files are not confidential in the sense that no one may have access to them. However, we must also conclude they are not subject to the provisions of Section 44-04-18, but rather to the provisions of Section 27-07-36 of the N.D.C.C., which provides they shall be open to inspection during office hours by persons having business therewith. The question of

whether a specific person has a direct or personal interest in certain probate records is as much a question of fact as it is a question of law. This office is not a determiner of fact. It would therefore appear, however, that the owner of the undivided mineral interest could be said to have the necessary direct or personal interest in certain records under certain circumstances. We believe that an abstracter certified pursuant to Chapter 43-01 of the N.D.C.C. would also have such an interest when preparing an official abstract.

In conclusion, it is our opinion that if a person who has established a direct or personal interest in certain probate records requests to see those records during office hours, the county judge must permit him to do so pursuant to Section 27-07-36 of the N.D.C.C.

Sincerely,

ALLEN I. OLSON

Attorney General